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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/312,992	05/17/1999	SCOTT E. JOHNSTON		3297

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EXAMINER

HOOK, JAMES F

ART UNIT	PAPER NUMBER
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3752

DATE MAILED: 02/25/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.
09/312,992

Applicant(s)
Johnston

Examiner
James F. Hook

Art Unit
3752



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Dec 16, 2002
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-9 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-9 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____ 6) ☐ Other:

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DETAILED ACTION

1. With respect to the request on page 1 of Amendment C filed on December 16, 2002 to "cancel Amendment A" such is improper procedure for amending a claim. As set forth in MPEP 714 and 37 CFR 1.121 b(4) and c, an amendment cannot be rescinded but must be amended following the procedures set forth in these sections. Only amendments to the claims following the procedure in MPEP 714 and 37 CFR 1.121 are allowed, where a marked up copy of the claim and a clean copy of the claim are required. Therefore, Amendment A remains in the case. The argument directed toward the 112 rejection is moot because there is no 112 rejection at this time, however, it should be noted that if the material that was removed were added back into the claims, they would still be rejected under 35 USC 112 2nd paragraph.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 1 and 2 are rejected under 35 U.S.C. 102(b) as being anticipated by Reed. The patent to Reed discloses, as seen in figures 1 and 2, a tubular object which is a pipe comprising an elongated strip of ductile material 4, such as metal (col.1, line 26), that is formed into joined

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adjacent helical convolutions having a diameter of 20 feet (col. 6, line 58), thereby meeting the language requiring a diameter larger than 15 feet, where the strip material is smooth (Figures 1,2), thereby meeting the recited structure of claim 2.

4. Claims 1, 2, and 4 are rejected under 35 U.S.C. 102(b) as being anticipated by McDonald. The patent to McDonald discloses, as seen in figures 1 and 2, a tubular object which is a pipe comprising an elongated strip of ductile material 62, such as metal (col. 1, line 63; col. 2, line 32), that is formed into joined adjacent helical convolutions having a diameter of approximately 21 feet, where the patent discloses a circumference of 66 feet (col.1 lines 65-66) which upon dividing the circumference by pi results in a diameter of approximately 21 feet, thereby meeting the language requiring a diameter larger than 15 feet, where the strip material is smooth or profiled (Figures 1-3), thereby meeting the recited structure of claim 2, and the convolutions are welded at the seams (col. 2, lines 44-59; Fig. 3) thereby meeting the limitations of claim 4.

5. Claims 1, 2, and 4 are rejected under 35 U.S.C. 102(b) as being anticipated by Steuber. The patent to Steuber discloses, as seen in figures 2 and 3, a tubular object which is a pipe comprising an elongated strip of ductile material 12a, such as metal (col. 2, lines 67-68), that is formed into joined adjacent helical convolutions having a diameter of 31 feet (col. 4, line 14) thereby meeting the language requiring a diameter larger than 15 feet, where the strip material is smooth, thereby meeting the recited structure of claim 2, and the convolutions are welded (col. 3, lines 19-28) at the seams thereby meeting the limitations of claim 4.

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Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Reed, McDonald, or Steuber in view of the Handbook of Steel Drainage and Construction Products (from now on referred to as the "Handbook"). The patents to Reed, McDonald, and Steuber disclose all of the recited structure (as set forth in the preceeding rejections based on each of these patents) with the exception of clearly disclosing an increase in dimensional proportions as pipe size is increased. The Handbook clearly discloses on page 40 that dimensional proportions such as corrugations are increased as pipe diameter sizes are increased in spirally formed pipe. It would have been obvious to modify dimensional proportions of the pipes in Reed, McDonald, and Steuber to be increased as pipe diameter increases as suggested by the Handbook, as such would be beneficial to use appropriate dimensions for the size of the pipe being made to provide adequate strength by inherently reducing the number of seams and reduce costs.

8. Claims 1, 2, and 4 are rejected under 35 U.S.C. 103(a) as being unpatentable over PRD Cortec Housing Manufacturing System (from now on referred to as Cortec) in view of McFatter.

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The reference to Cortec discloses the recited spirally formed pipe, where houses or building structures are created as well as pipes for irrigation, drainage, and sewers, which can be formed by a continuous process by a spiral mill to produce 15 foot diameter pipes, where the walls formed are corrugated meeting the structure of claim 2, and lock seams are disclosed thereby meeting the limitation of claim 4. The reference to Cortec discloses all of the recited structure with the exception of the diameter of the pipe being larger than 15 feet. The patent to McFatter discloses an apparatus that is used to create a spirally formed tubular section in a continuous process having a diameter of 31 feet. It would have been obvious to one skilled in the art to modify the pipe made in Cortec to have a diameter larger than 15 feet as suggested by McFatter if a larger diameter pipe is needed and simply to increase useful volume.

9. Claims 5-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cortec in view of the Handbook of Steel. The reference to Cortec above discloses all of the recited structure including a pipe that has a diameter larger than 144 inches, however, does not disclose reshaping the pipe into arch shapes, or increasing dimensional proportions of the pipe as pipe size is increased. The Handbook further discloses that pipes used for culverts and drainage can be reshaped into arch shapes if needed. It would have been obvious to one skilled in the art to modify the cylindrically shaped drainage pipe, sewer pipes, or culverts of Cortec by reshaping them into arch shapes as needed for a particular application as suggested by the Handbook.

10. Claims 5-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over the Handbook of Steel in view of Cortec. The Handbook reference discloses all of the recited structure set forth

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above with the exception of explicitly stating that spiral formed pipes can exceed 144 inches in diameter before reshaping into arches. It would have been obvious to one skilled in the art to modify the dimensions of the pipe used for reshaping in the Handbook by using a 15 foot diameter spirally formed pipe as suggested by Cortec, to meet applications requiring larger diameter pipes.

11. Claims 1-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Handbook of Steel in view of McFatter. The Handbook reference discloses all of the recited structure with the exception of explicitly reciting that spiral formed pipes can have diameters larger than 15 feet. In order to provide more useful volume, it would have been obvious to one skilled in the art to make spirally formed pipes having diameters larger than 15 feet as suggested by McFatter which teaches that pipes can be formed by spiral joining methods that can exceed 15 feet in diameter to meet the needs of the user.

Response to Arguments

12. Applicant's arguments filed December 16, 2002 have been fully considered but they are not persuasive. For clarity the examiner will refer to page numbers of the applicants request for reconsideration filed on December 16, 2002, and any use of the terms "Cortec" and "Handbook" will be used in the same manner as they are above to refer to the two non-patent documents. It should also be noted that silos allow for the input of material at the top and removal of the material at the bottom thereby providing a flow of material from top to bottom, such applies to any of the rejections based upon silo patents below.

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On page 3, with respect to the arguments directed toward Reed, the body portion of the silo 1 is a tubular object, which meets the claim language because a patent may have additional structure than that claimed by applicant but still meet the limitations of the claim, which is all that 35 USC 102(b) requires. Additional structure in the patent that is not claimed is irrelevant. With respect to the argument directed toward the use of the word “tube”, it should be noted that the examiner used the term “**tubular object**” (emphasis added). It is known in the art that the terms tube, pipe, hose, conduit, and duct are all considered interchangeable and all can be either open or have closed ends, such as capped or plugged pipes like man hole covers that close the end of a sewer pipe. It is not a persuasive argument to say that tubes are known to have closed ends because any pipe, tube, hose, conduit, or duct can also have a closed end. Reed discloses all of the claimed structure with regards to the tubular wall. Webster’s 10th Edition Collegiate Dictionary sets forth the definition of pipe as follows: “a long tube or hollow body for conducting **a liquid**, gas, or finely divided solid or for **structural purposes**” (emphasis added) and goes on further to define pipe as “a **tubular** or cylindrical **object**, part or passage” (emphasis added). Therefore it is clear that the tubular object or wall in Reed is the equivalent of a pipe, and that pipes are known to be used to create structural objects in addition to conducting liquid. Any argument directed toward the definition of tubular object or tube having a closed end or not having the same meaning as “pipe” is not persuasive (such argument is also applicable to the statements set forth on page 8 of applicant’s response). With respect to the argument that all pipes are “self supporting” such is not persuasive when there are many pipes in use for tunnels for

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cars, trains, and such that require support structure. With respect to the orientation of applicants pipe, such is not a persuasive argument when such is not a limitation of the claim, and the word "pipe" cannot be used to define only pipes of one orientation when it is known that pipes are disposed in many applications in vertical positions, such as plumbing in houses.

On page 4, the arguments directed toward McDonald are essentially repeated arguments that were used against Reed above, the same reasons apply to McDonald for why such arguments are not persuasive.

On page 5, the arguments directed toward Steuber are essentially repeated arguments that were used against Reed above, the same reasons apply to Steuber for why such arguments are not persuasive.

With respect to the arguments presented on pages 6-7, the patents to Reed, McDonald and Steuber disclose all of the recited claim structure, any arguments directed toward features in these patents which are not claimed by applicant are not persuasive and irrelevant as set forth above. Applicant does not claim any structure which differs from the prior art. Applicants arguments seem to be directed to a method, however, only article claims exist in the case. Therefore, there is no apparent difference between applicants claimed invention and the prior art references set forth above.

On page 7, in response to applicant's argument that the tubular objects set forth in Reed, McDonald, and Steuber are not pipes but are silos is not persuasive in that such is intended use and such is not even part of the claim language at this time, however, a recitation of the intended

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use of the claimed invention does not change the structure claimed and therefore will not overcome the prior art rejections above. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). With respect to the argument that the prior art “has not been implemented” such is not required of a piece of prior art to be applicable, the patent itself is prior art regardless of whether it ever has been implemented, and therefore has no bearing on the teaching of the prior art references. The references do not need to be currently in use or ever have been developed further to be applicable prior art. Applicants arguments to the limitations of his word “pipe” in the claims does not set forth a use, and pipes are known to have many uses including forming handles, or legs of tables, or hollow support bars, and as suggested by the Webster’s definition above, the word “pipe” is not limited to any specific use. Different uses exist for any object, such does not change the physical make up of that object and therefore the prior art teaches all of the claimed structure.

With respect to the arguments presented on page 8, the recitation of the Board of Appeals Decision is not applicable to the current rejection when the passage quoted refers to different embodiments in the same piece of prior art, and specifically that parts of different embodiments cannot be picked and chosen to anticipate a claim. The rejections above refer to only one embodiment which possess all of the claimed structure, any additional structure that the patent may disclose is irrelevant as set forth above. Therefore, applicants argument is not persuasive

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because the quote used from the Appeal decision is not relevant to the current rejection being made. It is also noted, however, that in general engineering principles it is known that an object lying down has a lower center of gravity and is more stable than the same object stood on its end which would have a higher center of gravity and would be less stable. The inclusion of supports to stabilize a tubular wall on its end, such as that of the prior art, would be required to provide necessary stability and does not suggest that such support is needed to prevent collapse when the same tubular wall is laid upon its side. Such an argument is merely speculation by applicant. As set forth above, applicants arguments with respect to the term "pipe" on page 8 are not persuasive in light of the Webster definition above, and in light of the fact that applicants definition is far narrower than the known definition of pipe. With respect to the applicants response on page 8, in the fourth paragraph, it is not the examiner's responsibility to provide proof that the tubular wall structure of a silo is useable as a pipe when the structure of the wall is a pipe as set forth in Webster's definition of pipe, and that such meets the applicants claim language, when such is merely intended use not even present in the claim language.

On page 9, the argument directed toward combining or removing parts of the prior art that are not in the rejection or in the claim language is not a persuasive argument. The Handbook teaches tubular formed spirally wound objects can have dimensions of parts which are adjusted based upon the final size or diameter of the pipe being made, therefore the modifying reference is not used to teach any other modification other than changing dimensional sizes used when larger diameter pipes are formed to proportionally change all dimensions of the pipe. What one skilled

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in the art of making tubular objects such as pipes would know is to vary dimensions as the size of the pipe is increased to keep a certain proportion to the sizes based upon the teachings of the Handbook. If faced with a problem related to the size of a strip making the wall of the prior art tubular objects, one skilled in the art would look to the spirally wound pipe art and a reference such as the Handbook would teach that as you increase the diameter of the pipe you should change the size of the strips being used accordingly. The fact that the references teach larger diameters than the Handbook, does not mean the Handbooks teachings of changing dimensions as diameter of the pipe changes is not pertinent, or in any way contrary to the teachings of the base reference. With respect to the 35 USC 103 rejection, such only applies to claim 3, and applicants claim limitation is drawn to a change in proportions, if such is applicants invention in claim 3 then the Handbook reference clearly teaches such was known in the art.

With respect to the arguments presented on page 10, Cortec discloses that a “spiral mill” can be used to “form large diameter corrugated tubes in one continuous process” and that such is used to make “houses but can also be used to create **tubes for irrigation pipes**, bridges, drainage sewers, culverts and concrete voids” (emphasis added). Such supports the fact that tubes are the equivalent of a pipe, and that pipes can be used to make houses which are known to be building structures, much the same as a silo is a building structure. The patent to McFatter discloses a device, such as a mill, that creates large tubular objects that have diameters that can reach 31 feet in diameter, by forming a spiral sheet into the cylindrical shape used for the tank. Therefore, the McFatter patent teaches that at the time the Cortec pipe was developed it was known in the art

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that mills used to form pipes such as Cortec were capable of forming pipes or cylindrical walls in the same manner having diameters up to 31 feet. Both references deal with the same type of cylindrical or tubular object and therefore motivation to combine them exists. Both articles use the same methods and the same type of apparatus to form them so they are considered in the same field of endeavor. In lines 22-23 of page 10, applicant states "the reference to Campbell correctly illustrates in Figure 1 a 'typical helically wound pipe winding machine' as is required to produce the Cortec pipe", however, it is noted first that Campbell is not a reference used in the rejection of any claims, but if applicant understands Campbell to be the same apparatus and method used to make Cortec, then applicant is admitting that such an apparatus is known in the prior art. McFatter is another such teaching of an equivalent apparatus to Campbell, and that used to form Cortec. However, it should be noted that applicants arguments are once again directed to a method and the claims under review are apparatus claims. The method is irrelevant when claims are drawn to an article and its structure.

With respect to the arguments presented on page 11, one skilled in the art of using an apparatus to form a large diameter tubular object such as Cortec would expect success of using any apparatus capable of forming a large diameter tubular object to form it's large diameter tubular objects, and would expect the same success with another apparatus which creates even larger diameter tubular objects in the same manner, such as set forth in the teaching of McFatter, which discloses such an apparatus which can be used to make the same object but of a larger diameter.

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With respect to the arguments presented on page 12, the Cortec reference discloses all of the claim structure with respect to claims 5-9 with the exception of flattening one side of the pipe. The Handbook teaches it is known in the art to flatten one side of a spiral formed pipe if desired. The dimensions required in claims 5-9 are taught by Cortec, which exceeds a pipe of 144 inches in diameter. Any argument trying to tie the teachings of the Handbook to size are irrelevant when the teachings of the Handbook being used are regarding shape change and not size. The modifying reference need not teach other limitations already taught by the base reference, only those limitations relied on in the rejection, and one skilled in the art in possession of the Handbook would find it obvious to flatten one side of the pipe in Cortec as such would form the same flat floor show in Cortec and would provide the volume changes suggested in the rejection above. Such would make the modification desirable and one skilled in the art would expect success based upon the Handbook teachings.

On page 13, the arguments with respect to the Handbook are not persuasive because the Handbook on page 39 states under Shapes of Conduits that "the designer has a wide choice of standard cross-sectional shapes of corrugated steel and structural plate conduits as shown in Table 1-1", further "size and service use may control the shape selected", and from Table 1-1 pipes are formed with an arch shape with a span and rise of 18" x 11" to 20' 7" x 13' 2", where the shape has "hydraulic advantages" further teaching the motivation to flatten a tube. One would know from the teachings of the Handbook that table 1-16 (page 50) which deals with corrugated steel pipe and on page 40 under Description of Corrugations clearly sets forth that lock seam pipe

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has diameters of 6, 8, 10 in, etc. and up to "120 in" which covers the same diameter ranges for arched pipe of table 1-16. Also, table 1-12 states lock seam construction only for dimensions having diameters in these smaller ranges. Based upon the Board of Appeals decision of October 9, 2002, page 5, the Board of Appeals understands the Handbook reference to be referring to shop fabricated corrugated steel pipe as being the equivalent of "spirally formed pipe" (line 5), and further applicant has argued that spirally formed pipe be used for small diameters and plate be used for larger diameters, all of which suggests table 1-16 deals with spirally formed pipe and that such can be flattened to achieve hydraulic advantages as set forth in table 1-1.

On page 14, with respect to claims 5-9, the Handbook is not clear on whether spiral formed pipe can be produced in diameters larger than 96" or not, but clearly teaches pipes can have diameters larger than 144" prior to reshaping, its just not set forth that such were possible for spirally formed pipe at the time. However, the Handbook clearly states on page 39 that shop fabricated "diameters gradually increased to 96 inches and larger". The Board of Appeals decision sets forth that this refers to spirally formed pipe as outlined above. Cortec is disclosing that tubular spirally formed objects can be made up to 15 feet in diameter which is greater than the 144" diameter required in the claims. As set forth above, the Board of Appeals understands the Handbook to recite positively that spirally formed pipe at least reached 96". With respect to claims 1-9, McFatter discloses that tubular spirally formed objects can be made up to 31' in diameter. The Handbook clearly sets forth making tubular shapes round or arched and only fails to meet a diameter requirement met by McFatter, therefore such rejection need not restate what

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the reference has already defined to teach in previous parts of the office action. Therefore, the examiner had set forth what the references teach. From the above redefining of the teachings of the references for clarity, it is therefore clear that one skilled in the art at the time the Handbook was written (1983) had the ability to make pipes larger than 96" (as stated in the Handbook on page 39), using the teachings of McFatter who formed the same type of structure up to 31' in diameter from spirally formed sheets to create a tubular wall in 1978 when McFatter's patent issued.

With respect to the arguments on page 15, McFatter, Reed, Steuber, McDonald, Cortec, and the Handbook all deal with the same subject matter, creating spirally formed tubular objects which are pipes as defined by the Webster definition of pipe, regardless of the intended use of the pipe. One need only be skilled in the art of making tubular objects from spirally formed sheets to understand the equivalence of using any apparatus that can make the same object that is structurally the same, but used for different purposes. Applicant, who is considered to be skilled in the art, has demonstrated in figure 1 of the instant application that one skilled in the art of forming sheet spirally into objects can use this technology to form buildings, silos, tanks, culverts, and pipes. It is clear others skilled in the art would be equally skilled enough to understand the equivalence of the prior art and expect success.

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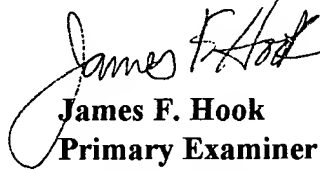
Conclusion

13. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to James Hook whose telephone number is (703) 308-2913. If the examiner cannot be reached, the examiner's supervisor Michael Mar can be reached at (703) 308-2087.

J. Hook
February 24, 2003


James F. Hook
Primary Examiner
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